**DEPARTMENT OF STATE REVENUE**

**LETTER OF FINDINGS NUMBER 99-0221 ST**
**SALES AND USE TAX**

**For Tax Periods: 1994 Through 1997**

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## Issue

**Sales and Use Tax- Public Transportation Exemption**
**Authority:** IC 6-2.5-3-2, IC 6-2.5-5-27, IC 26-1-2-319(1), 45 IAC 2.2-5-61 (b), National Serv-All, Inc. v. Indiana Department of State Revenue, 644 N.E. 2d 960 (Ind. Tax 1994), Indiana Waste Systems of Indiana, Inc. v. Indiana Department of State Revenue, 644 N.E. 2d 960 (Ind. Tax 1994), Panhandle Eastern Pipeline Company and Trunkline Gas Company v. Indiana Department of State Revenue, 741 N.E.2d 816 (Ind. Tax 2001).

The taxpayer protests the assessment of tax on certain trucks, gasoline, parts and accessories for those trucks.

## Statements of Facts

The taxpayer is an Indiana corporation that processes pork bellies and sells the end products. The Indiana Department of Revenue assessed additional sales and use tax, interest and penalties after a routine audit. The taxpayer timely protested the assessment. Further facts will be provided as necessary.

**Sales and Use Tax-Public Transportation Exemption**

## Discussion

IC 6-2.5-3-2 imposes the use tax on "the storage, use, or consumption of tangible personal property in Indiana,. . . " Certain items qualify for the public transportation exemption to the use tax pursuant to the following provisions of IC 6-2.5-5-27:

> Transactions involving tangible personal property and services are exempt from the state gross retail tax, if the person acquiring the property or service directly uses or consumes it in providing public transportation for persons or property.

The taxpayer processes pork bellies and then sells the end products of bacon bits, cooked bacon slices, cooked round bacon slices, turkey products and oils. The taxpayer also delivers products to its customers. The auditor assessed tax on the taxpayer's trucks, gasoline and repair parts. The taxpayer contends that these items qualify for exemption from the use tax pursuant to the public transportation exemption. The taxpayer supports this contention by citing the definition of public transportation found at 45 IAC 2.2-5-61 (b) as follows:

> Public transportation shall mean and include the movement, transportation, or carrying of persons and/or property for consideration by a common carrier, contract carrier, household goods carrier, carriers of exempt commodities, and other specialized carriers performing public transportation service for compensation by highway, rail, air or water, which carriers operate under authority issued by, or are specifically exempt by statute or regulation from economic regulation of, the public service commission of Indiana, the Interstate Commerce Commission, the aeronautics commission of Indiana, the U.S. Civil Aeronautics Board, the U.S. Department of Transportation, or the Federal Maritime Commissioner; however, the fact that a company possesses a permit or authority issued by the P.S.C.I., I.C.C., etc., does not of itself mean that such a company is engaged in public transportation unless it is in fact engaged in the transportation of persons or property for consideration as defined above.

The taxpayer alleges that its trucking operation meets this definition of public transportation. Product is delivered FOB the taxpayer's shipping dock. Loss of product liability goes to the customers. The delivery service is optional to the customers. Some customers actually have other trucking services deliver the product. The taxpayer only carries transportation of vehicles liability insurance. The taxpayer's trucks backhaul other products through a freight broker. Taxpayer has a motor carrier permit and is regulated by governmental agencies.

The issue to be determined in this case is how the public transportation exemption from the use tax applies to the taxpayer's delivery process.

The Indiana Tax Court has addressed the issue of public transportation in several cases. The first two cases involved contract hauling of garbage. In National Serv-All, Inc. v. Indiana Department of State Revenue, 644 N.E. 2d 960 (Ind. Tax 1994), the Court stated that although National Serv-All "engaged in 'public transportation' when it hauled Contract garbage," nonetheless National Serv-All did not prove "that its hauling of Contract garbage was the *predominant share* of its use of the items at issue." Id. At 959. (Emphasis in the original). The Court concluded: "Although National engaged in the public transportation of property within the meaning of IC 6-2.5-5-27 when it hauled Contract garbage, it did not prove it predominantly engaged in public transportation." Id. at 960.

The Court faced a similar issue concerning the applicability of the public transportation exemption to the contract hauling of garbage in Indiana Waste Systems of Indiana, Inc. v.

Indiana Department of State Revenue, 644 N.E. 2d 960 (Ind. Tax 1994). In that case the Court held as follows:

> Waste Management's maximum annual revenue from public transportation was 17.7 percent of its total revenue, and therefore, the remaining 80 percent of its revenue came from non-public transportation. The predominant use of Waste Management's trucks and other items, therefore, is not exempt. . .

Id. at 962.

The third case dealing with this issue in Panhandle Eastern Pipeline Company and Trunkline Gas Company v. Indiana Department of State Revenue, 741 N.E.2d 816 (Ind. Tax 2001). The petitioners were pipeline companies that transported natural gas belonging to third parties and natural gas belonging to the petitioners. In each case, the predominate use of the pipelines was to transport natural gas belonging to others. The Court, after noting the relevance of its two previous cases on public transportation, stated the following.

> If a taxpayer acquires tangible personal property for predominate use in providing public transportation for third parties, then it is entitled to the exemption. If a taxpayer is not predominately engaged in transporting the property of another, it is not entitled to the exemption.

Id. at 819.

The Indiana Tax Court has set out a two-pronged test to determine if a particular business qualifies for the public transportation exemption from sales and use tax. First the taxpayer must be predominately engaged in public transportation of the property of another. Secondly, the taxpayer's property must be predominately used for providing public transportation.

The first prong looks at the taxpayer itself. A determination must be made whether or not the taxpayer is engaged in public transportation. The second prong looks at the individual units to determine how they are used. Both prongs must be satisfied for the taxpayer to qualify for the public transportation exemption.

In this situation, the taxpayer is primarily engaged in the processing of pork bellies and sale of those products. It is not predominately engaged in public transportation. Therefore, having failed the first prong of the test, the taxpayer does not qualify for the public transportation exemption from the sales and use tax for any of the years of the audit. The Department does not need to determine whether the taxpayer's hauling of its own product is indeed public transportation.

## Finding

The taxpayer's protest is denied.

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